

# Scotland as a mixed jurisdiction and the development of European private law: is there something to learn from evolutionary theory?

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# SCOTLAND AS A MIXED JURISDICTION AND THE DEVELOPMENT OF EUROPEAN PRIVATE LAW: Is There Something to Learn from Evolutionary Theory?

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## 1. Introduction

The aim of this contribution is to consider whether there are any lessons to be learnt from the development of mixed jurisdictions, such as Scots law, for the emergence of a uniform private law for Europe. Or, to put it otherwise: Can mixed jurisdictions be a model for the future developments within the European Union? This question is, of course, not a new one. It has received more and more interest over the last few years. The very idea of Scots law as a model, also outside the European context, is even much older. Hector MacQueen in his Utrecht *Ius Commune* lecture,<sup>2</sup> traces the idea back to 1924, when the famous French comparatist Lévy Ullmann noted that ‘Scots law gives us a picture of what will be some day the law of the civilised nations, namely a combination between the Anglo-Saxon and the Continental system’. In the recent debate on the possibilities of attaining a uniform European private law, several authors have pointed to the experience Scots law can offer in this respect.<sup>3</sup> In drafting sets of principles of European private law, Scots law has already played an important role.<sup>4</sup>

This contribution does not focus on the many different reasons why it could be useful to look at Scots law as a model for the development of private law in Europe. I want to focus on the idea of Scots law as being able to make a *selection* for the best rules of different legal

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<sup>1</sup> Professor of European Private Law, Maastricht University. I have as much as possible retained the text of the original lecture held in Edinburgh on 20 June 2003.

<sup>2</sup> Hector L. MacQueen, *Scots Law and the Road to the New Ius Commune*, Ius Commune Lectures on European Private Law 1, Maastricht 2000, p. 2 (also published in EJCL, vol. 4.4 (December 2000), <<http://www.ejcl.org/44/art44-1.html>>).

<sup>3</sup> Cf. the overview in Jan Smits, Introduction: Mixed Legal Systems and European Private Law, in: Jan Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law* (Antwerp: Intersentia, 2001), pp. 1-13.

<sup>4</sup> In particular in the case of the PECL (O. Lando & H. Beale (eds.), *Principles of European Contract Law*, Parts I and II (The Hague: Kluwer Law International, 2000); O. Lando, E. Clive, A. Prüm & R. Zimmermann (eds.), *Principles of European Contract Law*, Part III (The Hague: Kluwer Law International, 2003)) and the PETL (D.J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen (eds.), *Principles of European Trust Law* (The Hague: Kluwer Law International, 1999)).

traditions. After all, the often held belief is not that Scots law is of importance just because there is some mixture of civil law and common law, but because this mixture is one of *quality*: supposedly the best rules of both the civil law and the common law traditions were selected by (in particular) the courts.<sup>5</sup> The famous saying of Lord Cooper that Scots law went through a process of ‘critically choosing and picking’ illustrates this well. In the following, I will first pay some attention to the idea of selecting rules and try to show that this method is gaining importance. Then, I will contrast the theoretical idea with the practice in the Scots and South African courts. This practice shows that selection of rules may be understood, not as a matter of quality of those rules, but rather along the lines of evolutionary theory.

With this focus on evolutionary theory, I intend to give a new dimension to the debate on the emergence of European private law. Usually, the question is asked whether a uniform private law for Europe is desirable. Here, the perspective is different: Is it *likely* that such a uniform law will develop? This question has received little attention so far, which is not surprising since it can only be answered by looking at theories outside law about how institutions tend to develop. In order to do this, we need some input from evolutionary theory.

## 2. The selection of rules: A theoretical framework

There is no easy answer to the question how to come to a uniform or harmonised private law for Europe.<sup>6</sup> It is clear, however, that any method has to find a way to diminish the total amount of rules at present available in Europe’s various legal systems. Often, similar questions are answered in different ways in each of these systems. Most of the methods that were developed by legal scholars differ as to how to select the ‘best’ rules. Generally speaking, these methods can be distinguished from each other in two different ways. The first is the way in which the selection of the relevant rules takes place; the second is the way in which the selected rules subsequently become part of the national legal systems.

As to the way of selecting rules, a popular view holds that the rules for a future European private law should be newly formulated rules. This is also the approach adopted by the drafters of the European principles of private law, as practised by the drafters of the Principles of European Contract Law and the collaborators within the European Civil Code project.<sup>7</sup> Here, new ‘principles’ are formulated because they are to constitute the common core of Europe’s legal systems or are supposed to be of high quality. This selecting method is usually associated with imposition of these rules on the European Member States: once the principles have been drafted, they can be implemented by replacing the national legal systems by a new ‘European’ legal system. Thus, it is the drafting committee (such as the Commission on European Contract Law) that decides what the future law will be. However, this is not necessarily the case: a set of principles of contract law may also be used as an alternative to national legal systems, leaving it to the contracting parties to opt in to this set, or to the courts

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<sup>5</sup> Debated, however, by Robin Evans-Jones, *Receptions of Law: Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, *Law Quarterly Review* 1998, pp. 228 ff.

<sup>6</sup> For an overview of the various options, see Jan Smits, *The Making of European Private Law* (Antwerpen: Intersentia, 2002), pp. 6 ff.

<sup>7</sup> On this project, see C. Von Bar, *Le Groupe d’Études sur un Code Civil Européen*, *Revue Internationale de Droit Comparé* 2001, pp. 127 ff.

to make use of it in deciding a case.

Another way of selecting the applicable rules is to leave it primarily to the market which rules should be adopted. In this method, it is more likely that the already existing rules of national legal systems will be chosen by the contracting parties (or the courts) as the applicable law.<sup>8</sup> This method is usually associated with 'soft law' harmonisation: leaving it to the legal actors themselves means that harmonisation can only be a slow process that is completely dependent on the market. Some coordination of this process is possible, however.<sup>9</sup>

I want to add that the idea of a free selection of rules is gaining more and more importance, even among the European institutions. In the European Commission's recent action plan on a more coherent European contract law,<sup>10</sup> for example, the Commission set out its plans for the further development of contract law in Europe. The most important measures proposed in this action plan are the following. First, it is proposed to solve the problems that are created by the intervention by the EC itself: the existing directives on contract law are often vague or inconsistent with each other. It is, of course, wise to remedy these deficiencies in the *acquis* that the EC has created itself. Second, and this is important for this contribution, the Commission proposes to introduce an 'optional instrument' on European contract law. This may be a contract code for cross-border transactions that the parties can adhere to if they so wish. This Code thus provides the parties with a new legal regime, next to the existing national legal systems and next to the regime of the CISG. Selection of what is considered best, is thus left to practice: it is up to the parties to decide whether they want to make use of this new regime or not.

It is now time to put these ideas about the selection of rules to the test. If one looks at mixed legal systems, such as Scots and South African law, is it really true that a choice was made for the 'better' law and how was this choice made?

### **3. The selection of rules in practice: The experience of Scots and South African law**

What *are* the facts in mixed legal systems such as Scots law as to the selection of rules? Is it true that choices were made for the better law (which of course presupposes that some solutions are worse than others)? If one looks at Scots contract law, what one sees is indeed that choices have often been made for rules from either the civil law or the common law tradition. These facts are well known. In the field of contracts, Scots law did not adopt the English consideration doctrine. Furthermore, it did not adopt the idea of specific performance as only a secondary remedy, as it is in English law: instead, a specific implement is, as it is on the continent, the primary action. On the other hand, the Scots accepted the English postal rule and the breach of contract by repudiation. Also the idea of the undisclosed principal, unknown to Roman-Dutch law, was taken from the English. In property law, the legitimate portion was abolished. One can go on and on in this way.

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<sup>8</sup> Cf. Smits, *The Making of European Private Law*, pp. 59 ff.

<sup>9</sup> Cf. Arnald J. Kanning, Review, *Modern Law Review* 2003, pp. 650 ff.

<sup>10</sup> Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law: An Action Plan, 12 February 2003, COM(2003) 68 final, also available at [http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003\\_0068en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0068en01.pdf).

Are these really choices for the ‘better’ rules? This is a question that cannot be answered without a criterion to decide what is better. It is very difficult to find a criterion that everyone will agree upon. In South African law, during the 1950s and 1960s, when *Purism* reigned, the decisive criterion for the courts was whether the rule was civil law (even more, was Roman-Dutch law) or not. There is a famous statement by the South African judge Van den Heever: ‘Since we observe the laws of Holland, we must exclude the Romanists of other countries, as well as the pragmatists from neighbouring regions’ (like the Frisians or the Germans).<sup>11</sup> This even led to the replacement, in 1963, of the well-developed English doctrine of nuisance (that had been established law at that moment in time for more than 80 years) by the Roman-Dutch law on rights of neighbours. In doing so, the court commented that it was such a pity that a fully worked-out system had to be replaced by an admittedly fragmentary treatment.<sup>12</sup> But it was the only thing the court felt it could do if it wanted to give effect to its preference for Roman-Dutch law. This is the worst result a mixed legal system can achieve. Of course, the criterion whether a rule is civil law or common law, can, in a mixed system, never be the criterion for deciding what rule should be adopted.

Are there any other criteria to decide which rule is best? It is indeed possible to propose such criteria, such as the clarity or transparency of the rule, its consistency with the prevailing legal system, the extent to which it gives effect to the prevailing socio-economic order, *et cetera*. In my view, however, it is simply impossible to hold the civil law solution or the common law solution to be the better one on the basis of any other criterion than that this solution is selected by the market. In this respect, the spontaneous process in which some rules *are* chosen and others are *not* is the only criterion we have. It is useful to make a comparison here with the world of the animals. Just as the consideration doctrine is not any better than the *causa* doctrine, the polar bear is not any better than the lion or is the Indian elephant inferior to the African elephant. These animals, just like legal rules, are just *different*.

I should add that if this were otherwise, if there were inherently better solutions, it would mean that those solutions would have been chosen in *all* mixed legal systems. This, however, is clearly not the case. The legitimate portion, for example, was abolished in South African law, but it still exists in Guyana.<sup>13</sup> Likewise, there were different choices made in Scots law and South African law, although I admit sometimes similar choices were made as well.

If one accepts the line of reasoning developed in the above, it means that there are not any inherently ‘better’ rules in civil law than in common law and vice versa. There are only *different* solutions. The consequence is that the existing law of the mixed systems must have emerged for other reasons than just the quality of the rule. Now, I should admit that there is probably no monolithic explanation for the taking-over of certain elements from another legal system: several factors play a role here, including the *belief* of the courts that one solution is superior to the other and the factor of economic power (it is not a coincidence that most of the

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<sup>11</sup> Van den Heever JA, Tjollo Ateljees (Eins) Bpk v. Small 1949 1 South African Law Reports 856 (AD), 865.

<sup>12</sup> Smits, *The Making of European Private Law*, p. 170.

<sup>13</sup> On how the Republic of Guyana still retains Roman-Dutch law in the fields of property law and succession, Smits, *The Making of European Private Law*, p. 139.

influence of English law on Scots law took place in the 19<sup>th</sup> century, in the heyday of the English empire). Still, it seems worthwhile to look into one specific theory that may explain these developments and that was not tested before. I am referring to a theory that was developed initially by Charles Darwin, one of the most famous former students of the University of Edinburgh. His ideas on evolution and survival of the fittest are still of crucial importance today in many other disciplines than just biology. These disciplines include psychology, political science, economics and even linguistics.<sup>14</sup> What the evolutionary framework in all these disciplines implies is that the idea of an unalterable human nature or of a conscious design should be abandoned in favour of the idea of 'selection by the environment', dependent on two different factors, namely nature and nurture.

If one transplants this idea to law, one finds that what is important in explaining, or even predicting, legal development is the *environment* in which the rules have to function (*nurture*) and the characteristics of the rules themselves (*nature*). The interaction between the two is what might explain legal development. The importance of this approach is illustrated by two 'evolutionary lessons' that I will apply to Scots and South African law and to the further development of private law in Europe.

#### 4. The selection of rules: Restraints on choosing?

The first question I want to address is whether it is possible to select rules on the basis of the inherent qualities of those rules. If one looks at the present debate on the emergence of a European private law, the answer seems to be affirmative. The prevailing idea is that the European Member States, but also contracting parties, will choose for the rules that best reflect their interests. Regarding the Principles of European Contract Law,<sup>15</sup> for example, many believe that these principles will be chosen by contracting parties that want to draft an optimal contract, or by legislators (in particular those in Central and Eastern Europe) that have to draft new national codes of contract law. The reason for this is that these principles are of high quality: they form what, according to eminent European experts, is the *desired* contract law for Europe.

If one looks at this high-stemmed ideal from the evolutionary perspective, it becomes clear that reality is different. What evolutionary theory emphasises is that not only the content (high quality) of the rules is decisive for their being taken over in a legal system, but also the environment in which these rules have to operate. This environment consists of the existing national legal system and this is not a new one. On the contrary, it has usually been formed over many centuries, often on the basis of coincidence and all kinds of other factors of a political, economic and cultural nature. My point is that these factors are today often a constraint on change. The standard example<sup>16</sup> is that of a road built a hundred years ago on

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<sup>14</sup> For more details, see Jan M. Smits, How to Predict the Differences in Uniformity between Different Areas of a Future European Private Law? An Evolutionary Approach, in: Alain Marciano & Jean-Michel Josselin (eds.), *The Economics of Harmonizing European Law* (Cheltenham: Edward Elgar, 2002), pp. 50, 53.

<sup>15</sup> Lando & Beale, *Principles of European Contract Law*, Parts I and II; Lando, Clive, Prüm & Zimmermann, *Principles of European Contract Law*.

<sup>16</sup> Cf. Mark J. Roe, Chaos and Evolution in Law and Economics, *Harvard Law Review* 109 (1996), pp. 641, 646 and Smits, How to Predict, p. 60.

the left-hand side of a river, while today it would be more advantageous to have it built on the right-hand side, because that is where the view is nicer or where most people live now. Yet, it is highly unlikely that the road will be rebuilt. This would simply cost too much, not only in money terms but also because people have become accustomed to the road on the left-hand side of the river. Moreover, there are probably activists who will oppose to any change in the landscape as it is, et cetera.

In law, this very same principle of ‘path dependence’ applies as well. Often, it is counterproductive to give up the existing rules only because there are other rules available that are supposedly ‘better’. What you see in any mixed legal system is therefore that there has to be very strong pressure to give up the already existing law. And the more complex an area of law is (in the sense of impenetrable, taking a lot of time and effort to get to know it), the less likely it is that it will change as a result of outside pressure. This is particularly true for property law. There, often very delicate national systems have evolved. It is stated by some authors that this area is less suitable for unification because it is deeply rooted in local legal tradition.<sup>17</sup> In my view, the true reason is that the investments already made in the *path* of property law make it too costly to deviate from it. In particular the fact that third-party interests would have to be reconsidered on a large scale stands in the way of harmonisation. This is confirmed by Scots law and South African law: in both systems, the existing property law was respectively feudal law and Roman-Dutch law, and changing these systems has proven to be very difficult. In Scots law, it is well known that feudal land law was not Romanised; other parts of Scots property law have remained civilian as well, despite strong pressure from English law.<sup>18</sup>

In this respect, property law can be contrasted to the law of contract. Contracting parties are not truly hampered by a change of the law because of their ability to set the rules for their relationship themselves. Parties can devise a contract themselves without third-parties’ interests being touched. This explains why legal transplants have been far greater in contract law than in property law, and why, generally speaking, in Scotland, the law of obligations as a whole is much more blended than property law. The same may explain why even in other systems a change in the law of obligations takes place more easily than a change in property law. And even within the law of obligations, there is a tendency to stick to the already existing law. I refer to the reception of the European product liability directive in England:<sup>19</sup> practice shows that the Consumer Protection Act 1987 is hardly ever used in English practice: practitioners stick to the more trusted negligence action in the case of defectively manufactured products. In the course of fifteen years, there have been few reported cases about the Act.

The importance of path dependence is also confirmed by Scots law in the field of unjustified enrichment. There, Scots law accepted the general principle and a separate body of law of restitution very late and probably under the influence of preceding developments in

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<sup>17</sup> Antonio Gambaro, Perspectives on the Codification of the Law of Property: An Overview, *European Review of Private Law* 5 (1997), p. 497.

<sup>18</sup> See, instead of many others, Grant McLeod, The Romanization of Property Law, in: Kenneth Reid & Reinhard Zimmermann (eds.), *A History of Private Law in Scotland*, Vol. 2 (Oxford: OUP, 2000), pp. 220 ff.

<sup>19</sup> Directive 85/374 concerning liability for defective products, OJ 1985, L 210/29.

English law. Robin Evans-Jones<sup>20</sup> makes clear that this area of the law was indeed strongly affected by English law, but only so late because of the fact that in Scots law there were the three rather technically embedded categories (causes of action, the ‘three Rs’), which made this area of the law rather ‘impenetrable’. This is different in areas of the law where there were no preceding rules. There, it is usually much easier to adopt new rules. Thus, in Scots trust law there has been a lot of borrowing from England. Also the history of commercial law shows this: financial transactions are often governed by newly invented legal rules that are subsequently taken over by other legal systems without too many problems. It is well known that in particular English commercial law was very quickly received in countries that were conquered by the English (such as South Africa).

The evolutionary lesson seems to be that a great amount of uniformity in the law is the least probable where changing the existing law is only possible at the expense of high cost. This has an important implication for the unification of private law in Europe. If there is any area of law where the drafting of new principles can be successful, it is contract law. But even there the contracting parties, but also the national courts and legislators, have to overcome their natural resistance to applying those principles instead of the law they are accustomed to. I am therefore pessimistic that the parties will apply the new instrument very often. Again, this has nothing to do with the quality of that instrument, but everything with the existing economic environment in which it has to operate. The legal certainty, so much liked by commercial parties, is provided much more by a national system, or by rules set by the parties themselves, than by a new and unknown set of principles.

## 5. The selection of rules: How does it take place?

The second point I want to make concerns *the way* in which the selection of rules takes place. It is often held that the Europeanisation of private law consists in the emergence of new European rules at the expense of national rules, which are then eliminated. However, evolutionary theory tells us that evolution often does not lead to the elimination of species (in the case of law, rules), but rather to some equilibrium of different species, constantly competing for survival. In the case of biology, the snake and the mouse exist at the same time.

This evolutionary lesson is beautifully reflected in mixed legal systems. There, very often the civil law and the common law approaches supplement each other, without an elimination of any rule whatsoever. Often, it is co-existence, not survival and elimination. In studying South African law, I found that often, and especially in the law of obligations, the generalising civil law approach (the approach of applying general principles) was supplemented by the common law approach of formulating specific and well-defined actions.<sup>21</sup> In the South African law of delict, for example, a general liability for wrongful acts

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<sup>20</sup> Robin Evans-Jones, Unjustified Enrichment, in: Reid & Zimmermann, *History of Private Law in Scotland*, pp. 369 ff.

<sup>21</sup> See in more detail Smits, *The Making of European Private Law*, pp. 221 ff. and 238 ff.



does exist, yet the courts also make use of the English catalogue of specific torts.<sup>22</sup> They were probably able to do so because of the close parallels between the Roman-Dutch system of delict and the English system of torts, but this is not important for the point I am trying to make. What is important is that by mixing the two approaches, the benefits of both the civil law tradition (flexible principles) and the common law tradition (legal certainty through specific actions) are combined. This is also reflected in the law of contract. South African law and Scots law both applied the fertile approach of accepting the general principle of specific performance (or implement) as the primary remedy of the creditor, but have derived their exceptions to that principle from English law and very much to their benefit. There are many more examples of this type of mixture and I think this is in particular where Scots law may serve as a fruitful model for the rest of Europe.

Again, I should add that in property law it is much more difficult to mix the principled approach and the approach of formulating specific actions. This is clearly shown by the confusion created by the House of Lords in the well-known case of *Sharp v Thomson*.<sup>23</sup> It is generally held that the effort to import common law ideas by way of one case into a Romanist structure of property law was something in which the House of Lords did not succeed. David Carey Miller calls this the paradox of a mixed system in which, as he states, 'civilian principles live in not always safe coexistence with a form of legal rule controlled by case law'.<sup>24</sup>

In the Principles of European Contract Law, the importance of combining principles and cases is often reflected as well. The principle on specific performance, for example, tries to mix the civil law principle and the common law exceptions, indeed having as a result that Scots law is well reflected in Article 9.102 PECL. One may say that the drafters of the PECL were in this respect fully exposed to evolutionary principles, although they did not know about it themselves.

## 6. Two final remarks

I want to make two final remarks. The first is concerned with a possible counterargument against my line of reasoning that evolutionary theory tells us something about how a legal system (be it Scots private law or European private law) will develop. The counterargument is that evolutionary theory only applies as long as there is the *possibility* of a free selection of rules. As soon as the European legislature decides to enact a European Civil Code, the argument is no longer valid because then we will have uniformity that has been *created* and that has not come about in a spontaneous way. I believe this is a false argument. Evolutionary theory tells us something about what is *likely* to happen, building on experiences in all kinds of disciplines. Action on the part of the legislator should be incorporated in this theory. This

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<sup>22</sup> Johann Neethling, Tort Law in South Africa: The Mixing of the General and the Particular, in: Jan Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law* (Antwerpen: Intersentia, 2001), pp. 81 ff.

<sup>23</sup> *Sharp v. Thomson*, 1997 SC (HL) 66. Cf. Kenneth Reid, Property Law: Sources and Doctrine, in: Reid & Zimmermann, *History of Private Law in Scotland*, Vol. 2, pp. 185, 196 for a listing of literature on this case.

<sup>24</sup> See D.L. Carey Miller, Transfer of Ownership, in: Reid & Zimmermann, *History of Private Law in Scotland*, Vol. 2, pp. 269, 303.

means that if Darwinian analysis predicts that uniformity will not prevail, it also says something about the *chances* that any legislator actually comes up with uniform private law for Europe or about the chances of success of a European Civil Code (in the sense that it really creates uniform law in practice).

Here, it is interesting to look at the evolutionary lesson that the more homogeneous the environment is, the fewer organisms will survive.<sup>25</sup> There is poverty of species in the desert as opposed to the rich wildlife in the rainforest. Applied to Europe and to law, this may imply that as long as there is not a truly unified Europe as to economy, culture, etc., a unified law will not emerge either. In other words, one needs to have one economy and one culture to have one law, otherwise diversity will remain. Again, I should like to repeat that this is *not* an assertion at the normative level, but at the empirical level. Evolutionary theory tells us something about what will happen, not about what should happen.

A second remark is that the experience mixed systems can offer us for the further development of private law in Europe may be a different kind of experience than it is often thought. It is not so much the experience of selecting the best rules, but it is first and foremost the experience of what are the limits of mixing civil law and common law. The experience of Scots law on this point, to be summarised in the two statements that not every area of law lends itself to successful harmonisation and that principles should always be supplemented by cases, is confirmed by general evolutionary lessons and by the experience of South African law. Taking this experience into account is essential: thus, Scots law does not provide a model for the way integration *should* be achieved in Europe, but for the way integration *will* be achieved.

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<sup>25</sup> Jan M. Smits, The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory, *Georgia Journal of International and Comparative Law* 31 (2002), pp. 79, 90.